

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2117

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM J. EVERS,

Plaintiff-Appellant,

v.

MARK MODERSON,

Defendant-Respondent.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William Evers appeals an order dismissing his action against Mark Moderson, a City of Appleton police officer. The trial court concluded that Evers' action was barred by dismissal of a previous lawsuit, that he failed to give notice

of claim on his state common-law actions and that he failed to state a claim under 42 U.S.C. § 1983. We affirm the order dismissing the complaint.

Evers initially filed a complaint alleging state common-law claims in Outagamie County (case no. 94-CV-283). That action was dismissed in part because Evers failed to file a notice of claim. Evers then filed this action in Racine County alleging a violation of his civil rights under color of state law in addition to the conspiracy and defamation claims alleged in his initial action. The present complaint alleges that Moderson conspired with the District Attorney to defame Evers by writing a letter to the parole commission falsely accusing Evers of criminal activity. The complaint also alleges that Moderson violated Evers' due process rights when Moderson sent this defamatory letter.

The trial court properly dismissed all of the state common-law causes of action based on Evers' failure to file a notice of claim. Evers' argument that no notice of claim was necessary fails for two reasons: first, this issue was adjudicated in his initial complaint. The doctrine of issue preclusion prohibits Evers from litigating an identical question before a different court.¹ See *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550, 225 N.W.2d 723, 727 (1995). Second, Evers was required to give notice of claim because § 893.80(1), STATS., requires notice of claim before commencing any lawsuit for acts done in the defendant's official capacity or in the course of his employment. Moderson's letter to the parole commission was written in his official capacity or in the course of his employment as a matter of law. The letter was written on Appleton Police Department stationary, was signed "Sgt. Mark Moderson Appleton

¹ The trial court treated this issue as one of "claim preclusion." We decline to address whether all of Evers' claims against Moderson arising out of the letter to the parole board are barred. Rather, we conclude that the necessity for filing a notice of claim was previously adjudicated and, because Evers has not filed a notice of claim, he cannot now proceed on the same claims.

Police Department,” and discloses the results of an investigation Moderson conducted as a police officer. Evers’ complaint does not identify any action taken by Moderson in his personal capacity. Therefore, Evers’ failure to give notice of claim and the preclusive effect of the earlier dismissal for failure to give notice of claim defeat all of Evers’ causes of action except the alleged civil rights violation.

Evers’ complaint fails to state a claim under 42 U.S.C. § 1983. The plaintiff can only use § 1983 to redress constitutionally protected rights, and cannot invoke the constitution to redress the tort of defamation. *See Siebert v. Gilley*, 500 U.S. 226, 231 (1991). The only constitutional right Evers asserts is a denial of due process. Due process rights apply to the decision-maker, the parole commission, and not to witnesses who appear before the commission. A lawsuit against a witness is not an appropriate method for challenging any alleged due process violation committed by the parole commission and is not the appropriate method for expunging erroneous information contained in a prisoner’s file. Certiorari review of the parole commission’s decision and administrative proceedings under WIS. ADM. CODE § DOC 238.11 provide the appropriate remedy for those alleged due process violations. To the extent Evers’ complaint alleges a due process violation by Moderson, it fails to state a claim for which relief could be granted.

Finally, Evers’ brief contains numerous unsupported allegations of judicial misconduct. Our review of the record discloses no basis for these accusations.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.